United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-1603

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

WINCEL HENDRIX,

Appellant.

Docket No. 74-1603

APPENDIX TO APPELLANT'S BREIF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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MICHAEL YOUNG,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

D. C. Form No. 100

CRIMINAL DOCKET

73 CR 641

~~JUDD, J.~~ MISHLER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.: AUSA- Joan ~~O'Brien~~
vs.	CLOSED
WINCEL HENDRIX	For Defendant: ~~R. Marvin ...~~ ~~147-08 Hillside Ave~~ ~~Jamaica, N.Y.~~ (~~523-7012~~)

Possession of narcotics with intent to distribute.

ABSTRACT OF COSTS	AMOUNT	DATE	NAME	RECEIVED	DISBURSED
Fine,		5-3-74	Notice of Appeal(no fee)		
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
7/3/73	Before MISHLER, CH. J.- Indictment filed. Bench Warrant ordered and issued as to deft HENDRIX
/5/73	Before JUDD, J.- Casecalled-Deft produced on a bench warrant-Counsel present-Deft arraigned and enters a plea of not guilty-Bail set for $40,000 Surety with 10 percent cash deposit-Case adjd to 9/10/73 for Trial.
/5/73	Bench Warrant retd and filed. Executed.
/5/73	Notice of Appearance filed.
/6/73	~~XXXXX~~ Notice of Readiness for Trial fied.
/6/73	By CATOGGIO, MAG.- Order filed for Acceptance of Cash Bail.
8/7/73	Magistrate's file 73M1007 inserted into CR file

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'73 CR 641

DATE	PROCEEDINGS
9/10/73	Before JUDD,J.- Case called- No appearance on behalf of deft- Case adjd 9/24/73
9/10/73	Affirmation of Marvin McKeller esq. filed
9-24-73	Before Judd J - Case called - deft & counsel Marvin McKeller present - adjd to Oct. 23, 1973.
10-23-73	Before Judd J - case called & adjd to Oct 29, 1973.
10-29-73	Before Judd, J - Case called - deft & counsel not present - adjd to Nov. 1, 1973 for status report.
11/1/73	Before JUDD,J.- Case called- Deft and counsel present- Adjd to 11/19/73 trial
11-19-73	Affirmation OF R. MARVIN MC KELLER filed.
11-19-73	Before JUDD, J - Case called & adjd to Nov. 26, 1973.
11-26-73	Before JUDD,J.- Case called- Deft and counsel present- Mr McKeller's to be relieved as counsel granted- Court assigns L.A.S. to represent Case adjd to 1-24-74 for trial
11-26-73	By JUDD,J.- Order appointing counsel filed
1-14-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
1-14-74	By JUDD, J - Writ Issued, ret. Jan. 15, 1974.
1-15-74	Before JUDD J - Case called - deft & counsel Joanna Seybert of Legal Aid present - defts motion for exoneration of bail - Motion argued - Motion granted - Bail exonerated but deft is to remain in custody on a detainer from Southern District of NY - case adjd to Jan. 23, 1974 for trial.
1-18-74	Writ retd and filed- Executed
1-23-74	Before JUDD, J - case called & adjd to 2-8-74.
2-8-74	Before JUDD,J.- Case called- adjd to 2-22-74
2-22-74	Before JUDD J - case called & adjd to March 1, 1974.
3-1-74	Before JUDD, J - case called & adjd to 3-6-74 for trial.
3-6-74	Before JUDD, J - case called - deft & counsel J.Seybert of Legal Aid present - defts own application to have Legal Aid relieved as counsel - Application denied - case adjd to March 12, 1974 for trial.
3-6-74	Notice of Motion filed, ret. Mar. 12, 1974, for suppression, etc.
3-12-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion for suppression.
3-13-74	Before MISHLER, CH.J.- Case called- Deft and counsel present-Hearing on motion to suppress held-On motion of A.U.S.A. Scotti count 3 is dismissed Motion to suppress denied-Hearing concluded-Trial ordered and begun Jurors selected and sworn-Trial contd to 3-13-74

DATE	PROCEEDINGS
3-13-74	Before MISHLER, CH J - case called - deft & counsel J.Seybert of Legal Aid present - trial resumed - Motion for Judgment of Acquittal is denied - deft rests - trial cntd to 3-14-74.
3-14-74	Before MISHLER, CH J - case called - deft & counsel Joanna Seybert of Legal Aid present - trial resumed - Both sides rest - renews motion for Judgment of Acquittal - Motion denied - at 12:1 the Jury retired for deliberation - at 1:20 PM the Jury returned and rendered a verdict of guilty on counts 1 and 2 - Jury polled Jury discharged - trial concluded - all motions reserved to time of sentence - bail set at $250,000 surety bond - sentence adjd without date.
3-14-74	By MISHLER, CH J - Order of sustenance filed (Lunch-16 persons
4-19-74	Before MISHLER, CH J - case called - sentence adjd to May 3, 1974 on consent.
4-23-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed
4-23-74	By MISHLER, CH J - Writ issued, ret. May 3, 1974.
5-3-74	Before MISHLER, CH J - case called - deft & counsel J.Seybert ofd Legal Aid present - deft sentenced to imprisonment for 10 years on count 1 and special parole term of 5 years; 5 years on count 2 plus special parole term of 5 years-said sentences to run concurrent and to run concurrently with sentence imposed in Southern District of NY on 2-21-74. Clerk to file Notice of Appeal without fee.
5-3-74	Judgment & Commitment filed - certified copies to Marshal.
5-3-74	Notice of Appeal filed (no fee)
5-3-74	Docket entries and duplicate of Notice of Appeal mailed to C of A together with Form A.
5-3-74	Writ retd and filed- executed
5-7-74	Certified copy of Judgment and Commitment retd and filed- deft rtnd to Federal Detention Headqurters
5-23-74	Stenographers Transcript dated 3-12-74 filed

A TRUE COPY ATTEST
LEWIS ORGEL, CLERK
BY [illegible] DEPUTY CLERK

D. C. 109

EJB:JOB:sj
F# 733 362

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73CR 641

- - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA

- against -

WINCEL HENDRIX,

Defendant.

- - - - - - - - - - - - - - - - - - X

Cr. No. _____
(T. 21, U.S.C., §841(a)(1)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 22nd day of June 1973, within the Eastern District of New York, the defendant WINCEL HENDRIX did knowingly and intentionally possess with intent to distribute approximately 794.3 grams (gross weight) of cocaine hydrochloride, a Schedule II narcotic drug controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT TWO

On or about the 22nd day of June 1973, within the Eastern District of New York, the defendant WINCEL HENDRIX did knowingly and intentionally possess with intent to distribute approximately 915.7 grams (gross weight) of marijuana, a Schedule I controlled substance. (Title 21, United States Code, Section 841(a)(1)).

COUNT THREE

On or about the 22nd day of June 1973, within the Eastern District of New York, the defendant WINCEL HENDRIX did knowingly and intentionally possess with intent to distribute approximately 17.7 grams (gross weight) of hashish, a derivative of marijuana, a Schedule I controlled substance. (Title 21, United States Code, Section 841(a)(1)).

A TRUE BILL.

Foreman.

UNITED STATES ATTORNEY

if they didn't believe the evidence, not to consider it. But, in my humble opinion, I thought the Government's summation was very fair and very moderate.

Anything else?

MRS. SEYBERT: No, your Honor.

THE COURT: All right, seat the jury.

(Whereupon, the jurors re-entered the courtroom and are now seated in the jury box.)

THE COURT: Mr. Foreman and ladies and gentlemen of the jury, in the case of the United States against Wincel Hendrix, the defendant is charged with two violations of what is commonly known as the Drug Abuse Act: Count One, with knowingly and intentionally possessing with intent to distribute cocaine; and Count Two, of knowingly and intentionally possessing with intent to distribute marijuana.

Trials in this country are known as adversary proceedings. The lawyers are competitors, adversaries. They take competing positions on a disputed fact issue. They disagree on a particular fact issue or issues, as in this case. The lawyers' obligation is to develop the evidence in the case in the adversary proceeding in that competition.

The lawyers prepare their case, bring it before

the jury, argue the case to you, and spread the evidence for the jury to see. And the jury's function is to examine the evidence objectively, dispassionately and free of all bias and prejudice and sympathy and then taking the instruction of the law that's pertinent to the case arrive at a determination of the guilt or innocence of the defendant on each charge.

You have your obligation and I have mine. It's quite different from that of the lawyers. The lawyers are partial, they represent clients and to do the best job, they must do it partially and zealously. Our obligation and function is different, we must look at it objectively; and as between the Court and jury there is a clear and distinct line of demarcation. Yours, as the sole judge of the facts, and mine, as the sole judge of the law. And you must accept the law as I charge it, even though you may disagree with it, even though you may think that you could fashion a better law, you have the obligation of accepting it and applying it.

Every defendant in every criminal case is presumed to be innocent; this is a strong time-honored presumption in Anglo-Saxon law. It means that at the outset of the trial you must conclude the defendant is not guilty of the charges in the indictment, and that

presumption is enough to acquit a defendant. The defendant must be found to be not guilty unless the Government proved beyond a reasonable doubt to the contrary, to wit, the guilt of the defendant, so that we say the presumption of innocence is enough to acquit the defendant.

I analogize this to what we call a Scotch verdict: In Scotland there are three verdicts: guilty, not guilty, and not proved. In this country we have two verdicts: It's guilty and not guilty, and not guilty includes not proved.

Now, what is guilt or what is proof beyond a reasonable doubt? Well, first I must tell you what reasonable doubt is. A reasonable doubt is a kind of doubt a reasonable person has after reviewing all the evidence. It's a doubt based on reason and common sense and on the state of the record, that is the evidence in the case, as distinguished from some vague speculative or imaginative doubt, or one arising from a disinclination or distaste for performing an unpleasant task. A reasonable doubt is the kind of doubt that a reasonable person would have in the most important of his own or her own affairs. Proof beyond a reasonable doubt is therefore proof of such a convincing

character that you would be able to rely upon it and act upon it unhesitatingly in the most important of your affairs.

The Government's burden is not to prove guilt beyond all doubt. The Government's burden is to prove guilt beyond a reasonable doubt. The Government's burden is not to prove that every bit of evidence offered in the trial is true beyond a reasonable doubt, and here I must hesitate for a moment to explain a statement made by Mrs. Seybert that might have had the effect that I'm sure she didn't intend: She seemed to say and the impression I got might have been different than yours -- she seemed to say that if the Government failed to prove beyond a reasonable doubt that this defendant had the few grams of cocaine in the aluminum foil and the marijuana cigarettes in the shirt pocket, then the Government failed to prove its case. That is not true if you got that impression. That is part of the evidence in the case, and as I say, the Government need not prove to you that every bit of evidence that's offered is true beyond a reasonable doubt. The Government must prove that every essential element of the crime charged is established beyond a reasonable doubt, and I'll charge you later on as to what the essential elements of the

crime charged is.

Reasonable doubt might arise from a failure of the Government to bring in evidence that you believe should have been brought into the case. The defendant does not have to prove his innocence, he may rely upon the Government's failure to prove the guilt of the defendant beyond a reasonable doubt.

Now, what is evidence? Evidence is the method that the law uses to prove or disprove a disputed fact. In other words, a contested fact. There are two types of evidence: one is direct evidence and the other indirect or circumstantial evidence.

Direct evidence is testimony of witnesses, what the witnesses saw or heard.

Indirect evidence is a procedure from which the jury may infer from circumstances, from established facts, the ultimate fact, the disputed fact. Of course, the jury uses their good common sense in drawing the ultimate fact.

Now, I use one example but some of you may have heard the example, so I will use another.

Suppose a disputed fact was whether it was raining outside. Now, you are in a closed courtroom. We have no windows. One side says it's raining out. Now, the other side says it isn't. When all of you

entered the courtroom today the sun was shining, it certainly was clear. If you saw two or three people walk into this courtroom with rainwear and all glistening and dripping and umbrellas and water dripping from the umbrellas, I think you would agree with me that from what you saw you could reasonably infer that it was raining out. The direct evidence of rain, if in truth it was raining, is if you looked out the window and saw the raindrops falling. But the circumstantial evidence from the established fact as to whether it was raining would be the wet outer clothing and the wet umbrella.

The law does not hold that one type of evidence is a better quality than the other. Sometimes circumstantial evidence is better; sometimes direct evidence is better. The law requires the Government to prove its case beyond a reasonable doubt, both on the direct and circumstantial evidence.

Now, I have used the term inference and I have used the term presumption, and there is a difference. An inference is a conclusion which the jury may make, as I indicated in circumstantial evidence; a presumption, on the other hand, is a conclusion which the law requires the jury to make and remains and prevails unless overcome by proof beyond a reasonable

doubt to the contrary, and that, of course, is a presumption of innocence.

Now, what is evidence in the case? Evidence is sworn testimony of the witnesses who appeared before you, regardless of who called the witnesses; the exhibits that are actually marked in evidence, regardless of who produced the exhibits.

I think it's of some help to charge you on what is not evidence. Statements made by counsel, statements in their opening statements, in their closing or summations is not evidence. It serves a very useful purpose, as you have been instructed, but it's not the evidence in a case. The lawyers in opening indicated to you what their positions were. The Government told you who the witnesses were going to be and indicated the nature of their testimony, so that when the witnesses were produced and they were examined, you could more easily follow their testimony. In summation, on the other hand, the lawyers argued theories, argued the evidence, focused on what they believe the important evidence to be. Mrs. Seybert argued theories of exculpability. She said my client is not guilty because the Government failed to prove its case beyond a reasonable doubt. And on the other hand, Mr. Scotti argued theories of inculpability, saying

the defendant is guilty, saying the Government did prove its case beyond a reasonable doubt. Both lawyers told you why.

Well, a reason may have sounded attractive to you, you may have accepted it, but you can reject the argument or all of the argument that counsel makes. The point is, it's not evidence, it just serves a useful function. It's also instructive to indicate to you that matters that aren't in the record or stricken from the record are not evidence.

(Continued on next page.)

If an answer was given and I struck it out for any reason, as I struck it out from the record, so should it be stricken from your mind and memory, and certainly from your consideration.

At times the court sustained ofjections to a question and you may not speculate on what the answer may have been if the witness were permitted to answer. At times, a lawyer incorporated a statement that had no support in the record, and the witness rejected the statement, said it wasn't so.

Now, the witness said it wasn't so, it isn't in the record. If there is no support for it, you may not assume that the lawyers' assumption of the facts as part of your consideration.

You, the jurors, are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves.

Scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider the witness's intelligence, consider the witness's motive and state of mind; consider the witness's demeanor and manner of

answering questions while on the witness stand. Ask yourselves, was the witness evasive? Did the witness answer directly? Take into consideration the witness's ability to observe the matters on which the witness is examined; whether the witness impressed you as having an accurate recollection of these matters.

Take into consideration the relation each witness might bear to either side of the case, the manner in which each witness might have been affected by the verdict. Take into consideration the extent to which each witness is corroborated or contradicted. Take into consideration whether the witness is contradicted in his or her own testimony or by other witnesses in the case.

Now, the defendant is not obliged to testify. He can assert his right not to testify, but once having taken the stand, he is to be judged like any other witness.

The government offered two statements which witnesses testified were made by the defendant. In one case, Special Agent McAndrews testified while in the house, the defendant in effect said, "No, don't take down the mirrors, that's all I had in the

HLeG:jm
Tape 4A

house." Special Agent Henderson testified that on June 23, 1973, during an interrogation by Assistant United States Attorney Vivane, he said something to the effect, "No, I don't think it's three-quarters, it's more like a half key." These statements are offered by the Government as admissions against the interest of a defendant.

Now, you must be careful about extra judicial statements, which means statements made out of Court, outside of the judicial process. You must receive them with caution and weigh them with great care. You must first determine whether those statements are knowingly and voluntarily made. The Government must prove beyond a reasonable doubt that the defendant was aware when he made those statements of what he was saying; that they weren't made by pure accident, inadvertence, or maybe slip of the tongue. The Government must prove beyond a reasonable doubt that the constitutional rights were given to the defendant; that he was aware of them; that he knew he had a right to be silent; he knew if he did say anything it could be used against him in Court; that he knew that he had a right to counsel; that he knew that he had a right to have counsel appointed for him.

Now, what I've said concerning the rights would apply only to statements made before Assistant United States Attorney Vivane on June 23rd. The other statement, the test on voluntariness and intent having been intentionally made is true, of course, but because the Government offered that on cross-examination and not on the direct case, the same test is not made. That's the only distinction but you must be satisfied that both statements were knowingly and voluntarily made.

Now, if you find the Government failed to prove that the statements were knowingly and voluntarily made, don't consider them at all; and if you do consider them, consider all the circumstances under which they were made to determine the weight to be given to the statements and you determine whether they are admissions, and you determine the weight that the admissions are to be given. The Government also offered statements of the defendant that were exculpatory in nature, tended to show the defendant was innocent. His statement concerning the Manite and the indication that he was taking this Manite over to a friend of his who I believe he said was Johnny. Now, first you must be convinced, again

beyond a reasonable doubt, that these statements were knowingly and intentionally made; that he was aware that he was making them for the purpose of telling the police officers when he was faced with a crime that he was innocent.

Now, if the Government has proved to you that those statements tending to show his innocence, exculpatory statements, were knowingly made and that they were false and that he knew they were false when made, then you may consider that and you may, if that and all the circumstance in the case warrants it, infer a consciousness of guilt. In other words, if you find that he knowingly lied when he was faced with a charge and in lying in effect said, "I don't know a thing about this", or "I am innocent of the charge", then you may consider that, in addition to all the other evidence in the case; and if you find the inference fair and reasonable, you may infer that he made that statement feeling that he was guilty of the crime charged. In other words, the law says quite logically, an innocent person need not fabricate a story, and if you find that the defendant did fabricate a story and he knew he was doing it, and the Government proved beyond a reasonable doubt that

he was aware that he was telling a lie and trying to show his innocence, that you may infer a consciousness in guilt.

Of course, you are not required to infer guilt from the statement, even though it was false. You may disregard it but you have the discretion to draw the inference of guilt.

Turning to the indictment, Count One charges on or about the 22nd day of June 1973, within the Eastern District of New York, the defendant, Wincel Hendrix, did knowingly and intentionally possess with intent to distribute approximately 794.3 grams of cocaine hydrochloride, a Schedule 2 narcotic drug controlled substance. Title 21, U.S. Code, Section 841 (a) (1).

Count Two.

On or about the 22nd day of June, 1973, within the Eastern District of New York, the defendant, Wincel Hendrix, did knowingly and intentionally possess with intent to distribute approximately 915.7 grams of marijuana, a Schedule 1 controlled substance. Title 21, U.S. Code, Section 841 (a) (1).

Charge

Now, before I get to the charge in the indictment, I intend to call your attention to the statement that Mr. Scotti made, in effect saying that Mrs. Seybert had called your attention to the fact that the Government failed to bring in the two individuals who were present in the defendant's house when the Government agents entered with a search warrant, and Mr. Scotti answered, in effect, that the defendant has a right to compulsory process, they could have brought these individuals in, and he added something like, if they had something to say, that was for the defendant's case, the defendant would have brought them in.

You must keep in mind that the defendant is not required to bring any proof in, but you must also understand that the defendant does have the right to bring in any witness and, of course, if the defendant did not know who those two persons were, and the record doesn't indicate that the defendant did, then the defendant couldn't have brought those two people in under the facts.

I thought I would just explain the argument made, and I wanted you to understand particularly that it's fruitless to have the subpoena power which a

defendant has.

Now coming back to the charge. These two counts are based on Section 841 (a) (1) which says in part,

"It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance."

To really understand these charges, you have to know something about the Drug Abuse and Control Act of 1970. You see, Count One charges possession with intent to distribute cocaine. Cocaine is described as a Schedule 2 narcotic drug; Count Two refers to possession with intent to distribute marijuana, a Schedule 1 controlled substance; so the first count charges the possession with intent to distribute a Schedule 2 narcotic drug and the second count a Schedule 1 controlled substance.

The Congress, in passing the statute, set up five schedules of controlled substances. It was the policy of the Congress to closely supervise the importation, the manufacture, the distribution and the possession of those controlled substances. In establishing a Schedule 1, under which marijuana is listed, the Congress said in Section 812, Schedule 1(a)

Charge

the drug or other substance has a high potential for abuse.

(b) The drug or other substance has no currently accepted medical use in treatment in the United States.

(c) There is a lack of accepted safety for use of the drug or other substance under medical supervision; and under that in Subdivision C -- Subdivision 10 of the schedule is listed marijuana.

Now, under Schedule 2, and the definition, it says:

(a) The drug or other substance has a high potential for abuse.

(b) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions,and,

(c) Abuse of the drug or other substance may lead to severe psychological or physical dependence.

And listed under Schedule 2 is the following, in part:

"Any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of

Charge

extraction and chemical synthesis;

Subdivision 4, cocoa leaves and any salt compound derivative or separation of cocoa leaves."

And I charge you that cocaine hydrochloride is a compound and a Schedule 2 narcotic drug as defined under Section 812.

(continued next page)

LeGendre
Tape 5
Follows

Charge

Count One charges possession with intent to distribute approximately 794.3 grams, gross weight. The Government doesn't have to prove that it was exactly 794.3 grams. If they proved it was about 500 or 580 grams, they have proved that portion of the element of the crime charged.

Now, on both cases the Government must prove the act of possessing as alleged. In other words, in Count One, the Government must prove the act of possessing cocaine hydrochloride on June 22, 1973. It says on or about. The evidence here is that it was June 22nd, but on or about. The Government must prove that beyond a reasonable doubt.

As to Count Two, the Government must prove beyond a reasonable doubt the act of possessing approximately 915.7 grams of marijuana.

There are two types of possession, one is actual possession and the other is constructive possession. If I hold these glasses in my hand, I actually possess these glasses. If I have actual direct physical control over it, I have the power to destroy it, give it away, do anything with it, we call that power to dominate the object.

Now, if this were in my chambers or in my

home I would have constructive possession even though I didn't have it physically in my hands, I had the power to control and dominate it, to give it away, to do what I want with it.

The Government need not prove actual possession. The Government must prove beyond a reasonable doubt either the actual or the constructive possession.

In this case there is no proof that the defendant actually had it in his physical control. The Government's proof shows that it was in the closet in the bedroom, and some of the testimony is that it was the bedroom occupied by the defendant and his wife. Now, that's the prohibited conduct. Congress says you may not possess cocaine, as charged in Count One. Congress says you must not possess marijuana, as charged in Count Two; but in every crime, in every felony crime there are two component parts: one is the proscribed conduct, do not possess; and the other is what we call the mens rea, the criminal intent. The Government must prove both beyond a reasonable doubt.

Now, what is the criminal intent defined by the statute? First, that the possession was knowing and intentional. By knowing, the Government must

prove beyond a reasonable doubt that he was aware of what the substance was, aware in the first count it was cocaine; aware in the second count that it was marijuana and intentional, knowing and understanding that he possessed it in violation of law and that he did it voluntarily, not accidentally. It isn't necessary for the Government to prove that he owned the marijuana or the cocaine, but it is necessary for the Government to prove that he possessed it; that it was within his domination and control and that he knew about it and that he possessed it intentionally.

As an additional element of criminal intent, the Government must prove beyond a reasonable doubt that the possession was with intent to distribute. In other words, that it was more than the type of possession that would indicate personal use, that he had it, intending to sell it; and, of course, both lawyers argued the evidence on that, and you have heard the arguments on it and you will have to pass on it.

Now, you'll shortly be excused from the courtroom to deliberate on the matter before you. Each one of you must decide the case for himself and herself. Look at the evidence again, free of all bias,

prejudice or sympathy. You are judges. Look at it like judges. The verdict of the jury is a considered conclusion of each juror based on the evidence and it's necessary that 12 jurors arrive at the same verdict. Each one must do it through his own mental processes and not just adopt someone else's opinion. It would be wrong for one of the jurors to come in and say, well, "I'm good-time Charlie, I never argue with anybody. I don't even want to go over the evidence. You tell me what you agree on and I'll go along." That's wrong. Just as wrong is intransigence, where someone comes in and suddenly says, "Now, I've made up my mind on it and when you'll come around to my way of thinking, we'll have the unanimous verdict." Now, both of those positions are wrong.

The jury process is a deliberate process where you talk about the evidence. Each one ready to change his view if you find that the first tentative opinion was improper and if you are convinced that the evidence brings you to a different conclusion. Now, during your deliberations you may have occasion to make inquiry of the Court. You may want some testimony read back. Just send me a note through your Foreman saying, "We would like this testimony read back."

If you can give the name of the witness and the subject matter, try to pinpoint it, it will be helpful. Mr. LeGendre will have difficulty finding it, it will take some time locating it. If you want the exhibits or any of the exhibits, just ask that they be sent in to you and I'll see that they be sent in to you.

After you have arrived at a unanimous verdict, write me a note, "We have a verdict." Don't tell me what the verdict is, just, "We have a verdict."

Now, when I receive that note I'll call the jury into the courtroom. I'll tell the Foreman to stand. I'll say, in the case of United States of America against Vincel Hendrix, how do you find the defendant on Count One, guilty or not guilty, then you will give me the verdict of the jury; how do you find the defendant Vincel Hendrix on Count Two, guilty or not guilty, then you will give me the verdict, then I'll ask each juror whether he or she agrees with the verdict.

When I get agreement in open court, then it becomes the verdict of the jury and not before.

Now, I'll ask you to retire from the courtroom. Don't start your deliberations yet and I'll call you back in a minute or two.

THE COURT: All right, bring in the jury.

(Whereupon the jurors re-entered the courtroom and are now seated in the jury box.)

THE COURT: I'm afraid I talked about exculpatory statements, false exculpatory statements, and I think the charge was pretty correct, but it has nothing to do with this case. The lawyers reminded me that no statements were made and offered, which tended to show innocence.

What I thought and what my pure memory brought to the charge was what I believe the defendant had said when faced with the charge, and no such evidence

is in the record and he made no such false exculpatory statements. That charge related to an instance where one is under arrest and faced with arrest and makes a statement or does something which tends to show innocence. There was no such evidence in this case, so I ask that you just disregard what I said about false exculpatory statements, there were none.

At the same time I charged you about admissions, if you recall, and I pointed to the evidence that was presented and of course that charge does cover the situation. I just want you to eliminate from your deliberations any false exculpatory statements. There were none. At this point I'll excuse Alternate No. 1. You may not deliberate on the matter.

Lunch was ordered for you, you'll get it from my chambers. I would appreciate your getting whatever you have out of the jury room, then go into my chamber and have lunch, and you are excused with the thanks of the Court.

Will the Clerk please swear in the Marshals.

(Whereupon, two United States Marshals were sworn by the Clerk of the Court.)

THE COURT: Now, I call your attention to the oath you first took and that is to render a true and just verdict, and that means that you'll render a

verdict of all bias, prejudice or sympathy based on the evidence and in accordance with the charge of the Court. Your first order of business will be lunch, because I know it's just been delivered.

For the next hour I will receive communication from you but I won't be able to answer them.

I'm going to release the lawyers for lunch. If you have any questions, just send them through your Foreman to the Marshal. The jury is excused for deliberation of the matter. You are excused for lunch until 1:15. We'll stand in recess until 1:15.

(Whereupon a luncheon recess was taken.)

Certificate of Service

6/26, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Michael A. [illegible]